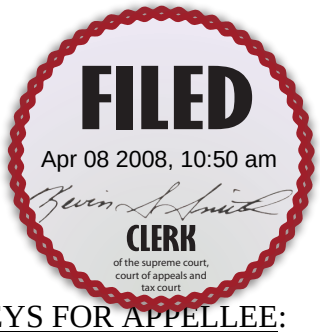

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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM SMIECHOWSKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0710-CR-576
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland Chamblee, Jr., Judge
Cause No. 71D08-0607-FA-32

April 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

William Smiechowski appeals his conviction of child molesting, as a class A felony.[1]

We affirm.

ISSUES

1. Whether there is sufficient evidence to support the conviction.

2. Whether the trial court abused its discretion in admitting evidence.

FACTS[2]

In the spring of 2006, J.T., who was born on June 17, 2000, lived in the State of Idaho with her parents and younger siblings: C.T and E.T. Due to financial difficulties, however, J.T.'s parents sent the children to live with their maternal grandparents in South Bend.

From approximately April of 2006 until June of 2006, Smiechowski and his wife babysat for J.T., C.T. and E.T. while their grandparents were at work. On some days, the children's grandmother would return home to find Smiechowski home alone with the children.

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[1] Ind. Code § 35-42-4-3.

[2] We remind Smiechowski that Indiana Appellate Rule 46(A)(6) provides that the statement of facts "shall describe the facts relevant to the issues presented for review . . . ." Furthermore, the statement of facts "shall be in narrative form . . . ." Ind. Appellate Rule 46(A)(6)(c). Smiechowski's statement of facts fails to provide a narrative of the facts relevant for review.

In June of 2006, J.T.'s parents joined their family in South Bend. On or about June 27, 2006, J.T. told her mother that Smiechowski had touched her "private parts." (Tr. 200). J.T. also complained of pain when she urinated.

On July 7, 2006, the State charged Smiechowski with one count of class A felony child molesting and two counts of class C felony child molesting.[3] A jury trial commenced on April 9, 2007, after which the jury found Smiechowski guilty as charged.

The trial court sentenced Smiechowski to thirty years, with ten years suspended, on the class A felony count; and four years on both class C felony counts. The trial court ordered the sentences be served consecutively. Thus, Smiechowski received an executed sentence of twenty-eight years.

Additional facts will be provided.

DECISION

1. Sufficiency of the Evidence

Smiechowski asserts that the evidence was insufficient to support his conviction.[4] Specifically, Smiechowski argues that there was no evidence of penetration to support his conviction of child molesting as a class A felony.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this

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[3] The State charged that Smiechowski had C.T. touch him and that Smiechowski fondled C.T. Smiechowski does not contest his convictions for class C felony child molesting.

[4] We remind Smiechowski that, pursuant to Indiana Appellate Rule 46(A)(7), the summary of argument "should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief."

> structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

The State charged that Smiechowski knowingly performed deviate sexual conduct with J.T. "Deviate sexual conduct" is defined, in part, as "[t]he penetration of the sex organ or anus of a person by an object." I.C. § 35-41-1-9. A finger is an "object" for purposes of deviate sexual conduct under Indiana Code section 35-41-1-9. *See D'Paffo v. State*, 778 N.E.2d 798, 802 (Ind. 2002).

In this case, J.T. testified as follows:

> [State]: When you were at your grandma's and [Smiechowski] was babysitting you, did anything happen that you didn't think should happen?
>
> [J.T.]: Yes.
>
> [State]: What happened?
>
> [J.T.]: Something nasty.
>
> * * *
>
> [State]: I'm going to show you a picture, okay? . . . What is this a picture of?
>
> [J.T.]: A girl.
>
> [State]: . . . Does the girl have her clothes on or off?
>
> [J.T.]: Off.
>
> * * *

[State]: . . . What did [Smiechowski] do?

[J.T.]: Touch me there.

[State]: Touch you where, honey?

[J.T.]: Right there.

[State]: When you say "right there,"—when you pointed right there, is that where you go potty?

* * *

[J.T.]: Yes.

[State]: Did he touch you any other place?

[J.T.]: Yes.

[State]: Where did he touch you? And that's where you go?

[J.T.]: To the bathroom.

[State]: You go [sic] bathroom. Is that where you poop?

[J.T.]: (Witness nods head).

* * *

[State]: . . . How did it feel when he touched you there?

[J.T.]: It hurt.

* * *

[State]: When you said that [Smiechowski] touched you and you pointed to where you go pee, did he touch you on the inside or the outside of your body?

[J.T.]: In.

[State]: Inside?

[J.T.]: Yes.

(Tr. 214-19). During cross-examination, J.T. testified as follows:

[Counsel]: [W]hen [Smiechowski] touched you where you go potty was it like touching your stomach?

[J.T.]: No.

[Counsel]: Can you maybe show me on your hand.

[J.T.]: (Witness indicating).

[Counsel]: Like a poke?

[J.T.]: (Witness nods head).

[Counsel]: . . . But was it just a poke on the outside?

[J.T.]: (Witness shakes head).

[Counsel]: That's a no.

(Tr. 222-23).

Furthermore, Smiechowski testified that he touched J.T. "[i]n her vaginal area." (Tr. 250). When asked where in J.T.'s vaginal area he touched her, Smiechowski responded, "[w]here about the clitoris would be." (Tr. 251).

> It is well settled that a conviction may stand on the uncorroborated testimony of a minor witness. Moreover, a conviction for child molesting will be sustained when it is apparent from the circumstances and the victim's limited vocabulary that the victim described an act which involved penetration of the sex organ. The unfamiliarity of a young victim with anatomical terms does not make her incompetent to testify when the facts are explained in simple or childlike language which the judge and jury can understand. Also, a detailed anatomical description of penetration is unnecessary. Proof of the slightest penetration is sufficient to sustain convictions for child molesting.

Smith v. State, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002) (internal citations omitted), *trans. denied*. It is not necessary that the State prove that the vagina was penetrated. *Scott v. State*, 771 N.E.2d 718, 724 (Ind. Ct. App. 2002), *trans. denied*. Rather, penetration of the external genitalia is sufficient to sustain a conviction. *Id.*

Here, J.T. was not quite seven years-old when she testified. Although her sexual vocabulary was limited, she nonetheless testified that Smiechowski touched her where she goes to the bathroom and touched her inside her body. Furthermore, Smiechowski admitted to touching J.T.'s clitoris. Given the testimony of both J.T. and Smiechowski, we find the evidence sufficient to sustain Smiechowski's conviction based upon deviate sexual conduct.

2. Admission of Evidence

Smiechowski asserts that the trial court abused its discretion in admitting a videotaped interrogation. The admission of evidence is a matter left to the sound discretion of the trial court, and a reviewing court will reverse only upon an abuse of that discretion. *Patton v. State*, 725 N.E.2d 462, 463 (Ind. Ct. App. 2000). An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). In determining the admissibility of evidence, the reviewing court will consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Prewitt v. State*, 761 N.E.2d 862, 869 (Ind. Ct. App. 2002).

During Smiechowski's trial, the trial court admitted—over Smiechowski's objection—Smiechowski's videotaped statement to Officer Chris Hinton of the South

Bend Police Department. During the interview, Smiechowski admitted to touching J.T.'s vaginal area and rubbing her vaginal area. Smiechowski also appeared to nod in the affirmative when Officer Hinton asked him whether he digitally penetrated J.T.'s vagina and explained that he may have caused J.T. pain because his fingernails were long.

During the interview, Smiechowski also explained that he fondled approximately seven neighborhood girls when he was between the ages of fourteen and fifteen years-old. Smiechowski denied fondling any children between that time and the incidents with J.T.

Smiechowski argues that the trial court abused its discretion in admitting the videotape because it included information regarding prior bad acts. Indiana Evidence Rule 404(b) provides in pertinent part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The purpose of this rule is "to prevent the jury from assessing the defendant's guilt in the present case on the basis of his past propensities." *Bryant v. State*, 802 N.E.2d 486, 498-99 (Ind. Ct. App. 2004), *trans. denied*. Thus, the State may not admit evidence of prior bad acts where it offers the evidence for the sole purpose of creating a forbidden inference that the defendant's present charged conduct is in conformity with his prior bad conduct. *Id*. at 499.

When a defendant objects to the admission of evidence on the grounds that it violates Evidence Rule 404(b), we must: (1) determine whether the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of such evidence against its prejudicial effect. *Wertz v.*

State, 771 N.E.2d 677, 683-84 (Ind. Ct. App. 2002). We will affirm the trial court's admission of evidence of prior bad acts or misconduct if it is sustainable on any basis in the record. *Bryant*, 802 N.E.2d at 499.

Here, we do not decide whether the trial court improperly admitted the videotape because we conclude that any error in the admission of the evidence was harmless. "'The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Wertz*, 771 N.E.2d at 684 (quoting *Headlee v. State*, 678 N.E.2d 823, 826 (Ind. Ct. App. 1997), *trans. denied*).

In this case, there was substantial evidence from which the jury could have concluded that Smiechowski engaged in deviate sexual conduct with J.T. Namely, J.T. testified that Smiechowski touched her "[i]n" her body, where she goes to the bathroom. (Tr. 219). Moreover, Smiechowski admitted during the interview that he touched J.T.'s vaginal area. Finally, during the trial, Smiechowski admitted to touching J.T. "[w]here about the clitoris would be." (Tr. 251). Accordingly, any error in admitting the videotape was harmless.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.